(9)

No: 04-5236

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

OCTOBER TERM, 2003

MICHAEL DONALD DODD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Michael Donald Dodd, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

KATHLEEN M. WILLIAMS
Federal Public Defender

Fort Lauderdale, Florida
July 14 , 2004

By: Janice L. Bergmann

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On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal prisoner may file a motion to vacate sentence under 28 U.S.C. § 2255 ¶ 6(3) within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." State prisoners may do the same under nearly identical language found in 28 U.S.C. § 2244(d)(1)(C).

The Question Presented is:

Does the one-year limitations period in 28 U.S.C. § 2255 ¶ 6(3) begin to run (i) when either the Court or the controlling circuit court has held that the relevant right applies retroactively to cases on collateral review (as the Third, Fourth, Sixth, Seventh, and Ninth Circuits hold), or instead (ii) when the Court recognizes a new right, whether or not it is made retroactively applicable to cases on collateral review (as the Fifth and Eleventh Circuits hold, and the Second and Eighth Circuits have stated in *dicta*)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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IN THE
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No:

MICHAEL DONALD DODD,

Petitioner

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UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Donald Dodd respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 02-16134 in that court on April 16, 2004, *Michael Donald Dodd v. United States*, 365 F.3d 1273 (11th Cir. 2004).

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit, *Michael Donald Dodd v. United States*, 365 F.3d 1273 (11th Cir. 2004)), is reproduced in Appendix A-1. The final judgment of the United States District Court is unpublished and is

reproduced in Appendix A-2. The report and recommendation of the United States Magistrate Judge is unpublished and is reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on April 16, 2004. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

Title 28, U.S.C. § 2255 ¶6

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of – • • •

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; • • •

Title 28, U.S.C. § 2244(d)(1)(C)

A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of – • • •

(3) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; • • •

STATEMENT OF THE CASE

In June 1999, this Court decided in *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L.Ed.2d 985 (1999), that where a criminal defendant is charged under 21 U.S.C. § 848 with being engaged in a continuing criminal enterprise ("CCE"), the jury must unanimously agree not only that the defendant engaged in a continuing series of violations, but also that the defendant committed each of the individual violations necessary to make up a continuing series. However, in 1995, when a jury convicted Petitioner Michael Dodd of a CCE violation, it did not unanimously find that he committed each of the individual violations as *Richardson* requires. Indeed, by the time of the *Richardson* decision, almost two years had passed since the completion of Mr. Dodd's direct appeal proceedings. *See United States v. Dodd*, 111 F.3d 867 (11th Cir. 1997).

Aware that 28 U.S.C. § 2255 ¶ 6(3) allowed a motion to be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," but unsure as to what that meant, Mr. Dodd contemplated filing a section 2255 motion soon after *Richardson* was decided. He was, however, thwarted in this effort when, four months after the *Richardson* decision, he was transferred from his permanent facility – and away from his legal files – to the Southern District of Florida pursuant to a writ of habeas corpus ad testificandum filed by the Government. He remained separated from his legal files until his return to his permanent facility. He did not file his *pro se* section 2255 motion until 22 months after *Richardson*, on April 4, 2001.

Little more than a year after Mr. Dodd filed his section 2255 motion raising his *Richardson* claim, the Eleventh Circuit held that *Richardson* applied retroactively to cases on collateral review. *Ross v. United States*, 298 F.3d 677 (11th Cir. 2002). By the time *Ross* was decided, however, the

district court had already dismissed Mr. Dodd's section 2255 motion as untimely because not filed within a year of *Richardson*. *See* Appendix A-3. On appeal, Mr. Dodd urged the Eleventh Circuit to join the majority of circuits that had concluded that the one-year period in § 2255 ¶ 6(3) did not begin to run until the new rule at issue was made retroactively applicable to collateral cases. Under the majority position, Mr. Dodd argued, his motion was timely because filed within a year of *Ross*. The Eleventh Circuit panel noted there was a split in the circuits regarding the date that triggered the one-year limitation period, but rejected the majority's interpretation, and instead joined the Fifth Circuit to conclude that Mr. Dodd's section 2255 motion was untimely because filed more than a year from the decision in *Richardson*. *Dodd v. United States*, 365 F.3d 1273, 1281 (11th Cir. 2004).

Mr. Dodd is currently serving a 360-month sentence; a sentence driven by the 20-year mandatory minimum term and United States Sentencing Guideline applicable to CCE convictions. *See* 21 U.S.C. § 848; U.S.S.G. § 2D1.5 (1995). As discussed below, had Mr. Dodd filed his § 2255 motion in the Third, Fourth, Sixth, Seventh, or Ninth Circuit, it would have been deemed timely and his *Richardson* claim heard on its merits. However, because he had the misfortune of filing in the Southern District of Florida, and the Eleventh Circuit has interpreted section 2255 ¶ 6(3) in a way that defies the language of the statute, his only recourse now is to this Court. He respectfully asks the Court to grant his petition for writ of certiorari to resolve this intractable circuit split.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeal are Intractably Divided Over the Question Presented.

The Eleventh Circuit openly acknowledged that there is a conflict among the circuits regarding when the one-year limitations period under 28 U.S.C. § 2255 ¶ 6(3) commences. *Dodd*, 365 F.3d at 1277 (describing split). The conflict arises from the convoluted language of the statute of limitations provisions that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996), other portions of which this Court has already had cause to consider. *See, e.g., Clay v. United States*, 537 U.S. 522, 123 S. Ct. 1072, 155 L.Ed.2d 88 (2003); *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L.Ed.2d 260 (2002); *Artuz v Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000). Indeed, § 2255 ¶ 6(3), and its companion § 2244(d)(1)(C), further demonstrate why "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 2068, 138 L.Ed.2d 481 (1997).

The Eleventh Circuit followed the Fifth Circuit, and *dicta* by the Second and Eighth Circuits, to focus on the phrase "initially recognized" in § 2255 ¶ 6(3). In these circuits, when the Court issues a decision recognizing a new right, as it did in *Richardson*, a § 2255 motion must be filed within one year of that decision, regardless of whether the right has yet been found to apply retroactively to collateral cases. The Third, Fourth, Sixth, Seventh and Ninth Circuits flatly disagree, focusing instead on the phrase "and made retroactively applicable to cases on collateral review" to hold that the one-year period does not begin to run until either the Court or controlling circuit court has held that the relevant right applies retroactively to collateral cases. Compare *United States v. Lopez*, 248 F.3d 427, 433 (5th Cir.), *cert. denied*, 534 U.S. 898 (2001); *Triestman v. United States*,

124 F.3d 361, 371 & n.13 (2d Cir. 1997) (*dicta*); *Nelson v. United States*, 184 F.3d 953, 954 (8th Cir.) (*dicta*), *cert. denied*, 528 U.S. 1029, 120 S. Ct. 549, 145 L.Ed.2d 427 (1999); with *United States v. Lloyd*, 188 F.3d 184, 187-88 (3d Cir. 1999); *In re Vial*, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) (*en banc*); *Pryor v. United States*, 278 F.3d 612, 616 (6th Cir. 2002); *Ashley v. United States*, 266 F.3d 671, 674 (7th Cir. 2001); *United States v. Valdez*, 195 F.3d 544, 548 (9th Cir. 1999). The First and Tenth Circuits have noted the circuit split, but not yet taken sides. *See Sepulveda v. United States*, 330 F.3d 55, 65 n.5 (1st Cir. 2003); *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000).

Importantly, this circuit conflict extends specifically to the treatment of *Richardson* claims. In the Seventh Circuit, a § 2255 motion is timely if filed within a year of when that court made *Richardson* retroactively applicable to collateral cases; in the Eleventh and Fifth Circuits, the limitations period expired a year after the Court decided *Richardson*. Compare *Fischer v. United States*, 285 F.3d 596, 600 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 867 (2003), with *Dodd*, 375 F.3d at 1281; *Lopez*, 248 F.3d 433.

The split also reaches down into the district courts, with an acknowledged split on the issue arising in two cases out of the same district. Compare *Berthoff v. United States*, 140 F.Supp.2d 50, 59-60 (D. Mass. 2001) (holding new limitations period "should run from the date on which either the Supreme Court of the controlling circuit court holds the new right to be retroactive on collateral review), *aff'd on other grounds*, 308 F.3d 124 (1st Cir. 2002), with *Breese v. Maloney*, ___ F.Supp.2d ___, 2004 WL 1497925 *4 (D. Mass. July 6, 2004) (expressly declining to follow *Berthoff*).

The Court's intervention is required because this split in the lower courts is intractable. Once a circuit decides when the one-year period begins to run under ¶ 6(3), future cases are litigated in

such a way that the courts in that circuit will rarely have an opportunity to reconsider that precedent. Indeed, Mr. Dodd's case only presents this important issue so squarely because the Eleventh Circuit was one of the few remaining courts of appeal that had not yet decided the question presented. Moreover, both the Fifth and Eleventh Circuits have recently reaffirmed their reading of the limitations provision, with no indication that they intend to reconsider their minority position. *See In re Hearn*, ___ F.3d ___, ___ n. 11, 2004 WL 1497552 n.11 (5th Cir. July 6, 2004) (one year limitations period under § 2244(d)(1)(C) for filing claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), expired one year after date *Atkins* was issued); *Howard v. United States*, ___ F.3d ___, 2004 WL 1418433 (11th Cir. June 25, 2004) (holding § 2255 motion timely because filed within one year of decision in *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L.Ed.2d 888 (2002)).

II. The Circuit Conflict is Untenable Given the Importance of the Question Presented.

The conflict over when the one-year limitations period begins to run under ¶ 6(3) merits this Court's attention. The issue can arise in any case in which a state or federal prisoner seeks relief under a new decision of the Court that has not yet been applied retroactively to collateral cases. For example, the Court's recent decision in *Blakely v. Washington*, ___ U.S. __, 124 S.Ct. 2531, ___ L.Ed.2d ___ (2004), has been described as potentially affecting thousands of federal prisoners. *Id.*, 124 S. Ct. at 2549 & n.2 (O'Connor, J., dissenting). Under the Eleventh Circuit's rule, large numbers of these prisoners will feel compelled to file protective § 2255 motions within a year of *Blakely* or risk losing all opportunity to obtain relief under that decision, even though *Blakely* has not yet been – and may never be – made retroactively applicable to cases on collateral review.

The importance of the conflict is heightened because it is outcome determinative. The

federal courts uniformly refuse to apply equitable tolling when a prisoner errs in computing the limitations deadline. Indeed, the Eleventh Circuit refused to do so for Mr. Dodd. *See Dodd*, 365 F.3d at 1282-83. Alternative remedies are likely unavailable. Federal courts have held that a *Richardson* claim fails to meet the stringent requirements for filing a successive § 2255 motion. *See* § 2255 ¶ 8; *Paulino v. United States*, 352 F.3d 1056, 1059 (6th Cir. 2003); *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S. Ct. 2052, 158 L.Ed.2d 496 (2004). Moreover, federal courts, including the Eleventh Circuit, refuse to permit federal prisoners to pursue *Richardson* claims via a writ of habeas corpus under 28 U.S.C. § 2241. *See Sawyer v. Holder*, 326 F.3d 1363, 1367 (11th Cir.), *cert. denied*, ___ U.S. ___, 124 S. Ct. 258, 157 L.Ed.2d 181 (2003); *Wesson v. U.S. Penitentiary*, 305 F.3d 343, 347-48 (5th Cir. 2002), *cert. denied*, 537 U.S. 1241, 123 S. Ct. 1374, 155 L.Ed.2d 212 (2003).

It is therefore not surprising that seven different circuits have been forced to confront the question presented in recent years, and four others have felt the need to discuss it. District courts have also repeatedly been forced to choose between the competing interpretations of § 2255 ¶ 6(3). *See Breese*, ___ F.Supp.2d at ____, 2004 WL 1497925 *4; *Baylor v. United States*, 314 F.Supp.2d 47, 51-52 (D.D.C. 2004); *United States v. Washington*, 271 F.Supp.2d 278, 282 (D.D.C. 2003); *Little v. United States*, 184 F.Supp.2d 489, 495-96 (E.D. Va. 2002); *United States v. Tush*, 151 F.Supp.2d 1246, 1248-49 (D. Kan. 2001), *aff'd on other grounds*, 287 F.3d 1294 (10th Cir. 2002); *Berthoff*, 140 F.Supp.2d at 59-60. Indeed, the large number of reported cases on the question most likely understates substantially the frequency with which the issues arises. A large percentage of district court decisions on prisoner petitions are not reported, either electronically or in published volumes. This was true for Mr. Dodd.

III. The Eleventh Circuit's Holding is Wrong.

Certiorari furthermore is warranted because the Eleventh Circuit's holding is wrong. Not any right will make the limitations period begin. Instead, the right must have "*been newly recognized* by the Supreme Court *and made* retroactively applicable to cases on collateral review." § 2255¶ 6(3) (emphasis added). By using the words "has been" and "made," the statute imposes two restrictions that have to have been satisfied *before* the limitations period begins to run. This is so because "Congress' use of verb tense is significant in construing statutes," and the statute plainly uses the past tense in defining these restrictions. *United States v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1354, 117 L.Ed.2d 593 (1992).

The interpretation of § 2255 ¶ 6(3) postulated by the Eleventh Circuit ignores the second of these requirements – that the right have been "made retroactively applicable to cases on collateral review." Rather, the court below excised this requirement from the statute to legislate judicially the policy result it desired. The Eleventh Circuit reasoned:

> It would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to ambiguous events. Rather, we believe Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review. Thus, the second clause in § 2255(3) qualifies the right asserted – not the time limit. [footnote omitted].

Dodd, 365 F.3d at 1279. But Congress did, in the Eleventh Circuit's words "qualif[y] that time frame." Congress imposed the two restrictions in the past tense. First, Congress stated that the Court already had to have newly recognized the right at issue. And second, Congress stated that a court already had to have made that right retroactive.

In excising the latter of these restrictions from the statute, the Eleventh Circuit contradicted

its avowed application of the plain meaning rule of construction by reasoning that "Congress was simply reiterating the obvious." That is, according to the Eleventh Circuit, Congress was simply repeating the statute's initial phrase, which states that the one-year limitation begins on the date that "right asserted was initially recognized by the Supreme Court," when Congress wrote "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The only thing plain about the Eleventh Circuit's rewriting of § 2255 ¶ 6(3), however, is that is that it was Congress' role to do so, not the Eleventh Circuit's.

The very language of § 2255 ¶ 6(3) compels the majority position. It requires that the new right be both "newly recognized" *and* "made retroactively applicable" in order for the one-year limitations period to be triggered. § 2255 ¶ 6(3). *See Pryor*, 278 F.3d at 614 ("To apply 28 U.S.C. § 2255 ¶6(3), two conditions must be determined: (1) the date on which the Supreme Court has recognized a new right and (2) whether the right has been "made retroactively applicable to cases on collateral review."); *Vial*, 115 F.3d at 1197 n.9 (holding that where there is no ruling yet on collateral availability of a new rule, "the limitations period has not yet begun to run."). As the Ninth Circuit noted in *Valdez*, to hold that a motion is untimely if filed more than a year from when the Court announces a new right would be to "ignore[] the second requirement of [§ 2255 ¶ 6(3)] – that the right have been 'made retroactively applicable to cases on collateral review.'" *Valdez*, 195 F.3d at 547.

Moreover, there are the very practical problems that arise from the Eleventh Circuit's view. The Seventh Circuit concluded that the one year to file must begin on the date that the Supreme Court's decision is made retroactive,

> [o]therwise, ¶ 6(3) is a mirage, for retroactivity decisions often come more than a

year after opinions newly recognizing constitutional rights. Although this question has occasioned disagreement among the court of appeals, the cases holding that the time starts from the Supreme Court's decision, rather than from the date that decision is held to be retroactive, do not explain how this leaves any work for ¶ 6(3) to do given the inevitable gap between the main decision and the retroactivity decision.

Ashley, 266 F.3d at 673-74 (internal citation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender

By: _____
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
July 14, 2004

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APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit.
Michael Donald Dodd v. United States, 365 F.3d 1273 (11th Cir. 2004) A-1

Final Judgment, United States District Court for the Southern District of Florida ... A-2

Report of United States Magistrate Judge A-3

APPENDIX A-1

Michael Donald DODD, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 02-16134.

United States Court of Appeals, Eleventh Circuit.

April 16, 2004.

Background: Following affirmance of his conviction for engaging in a continuing criminal enterprise (CCE) and other offenses, 111 F3d 867, federal prisoner filed petition to vacate, set aside, or correct his sentence. The United States District Court for the Southern District of Florida, Nos. 93-00304-CR-FAM and 01-01347-CV-FAM, Charlene H. Sorrentino, United States Magistrate Judge, and Federico A. Moreno, J., dismissed the petition, and prisoner appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

(1) limitations period for postconviction claim based on new right recognized in *Richardson* began to run on the date when the Supreme Court initially recognized the right, rather than date on which court held the new right to be retroactive on collateral review, and

(2) petitioner was not entitled to equitable tolling of limitations period for filing postconviction claim.

Affirmed.

1. Habeas Corpus ⇐842, 846

Court reviews *de novo* a district court's determination that a petition for federal habeas corpus relief was time-barred, and likewise reviews *de novo* a district court's determination that equitable tolling is inapplicable; however, a district court's determinations of the facts relevant to a petitioner's equitable tolling claim will be reversed only if clearly erroneous.

2. Criminal Law ⇐1586

Richardson, which required jury to agree unanimously about which specific violations made up "continuing series of violations" of continuing criminal enterprise (CCE) charge, established a newly created right within the meaning of limitations period for postconviction claims based on newly recognized rights. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848; 28 U.S.C.A. § 2255(3).

3. Courts ⇐100(1)

New right announced in *Richardson*, which required jury to agree unanimously about which specific violations made up "continuing series of violations" of continuing criminal enterprise (CCE) charge, was retroactively available on collateral review. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

4. Criminal Law ⇐1586

One year limitations period for postconviction claim based on new right recognized in *Richardson*, which required jury to agree unanimously about which specific violations made up "continuing series of violations" of continuing criminal enterprise (CCE) charge, began to run on the date when the Supreme Court initially recognized the right, rather than date on which court held the new right to be retroactive on collateral review. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848; 28 U.S.C.A. § 2255(3).

5. Criminal Law ⇐1586

While equitable tolling is an extraordinary remedy which is typically applied sparingly, it can be applied to prevent the application of Antiterrorism and Effective Death Penalty Act's (AEDPA) statutory deadline on postconviction claims when extraordinary circumstances have worked to prevent an otherwise diligent petitioner from timely filing his petition. 28 U.S.C.A. § 2255.

6. Criminal Law ⇐1586

Petitioner was not entitled to equitable tolling of limitations period for filing postconviction claim during the period when he was transferred to another facility, and thus did not have access to his papers; petitioner's transfer was not unconstitutional or otherwise inappropriate, and petitioner, who did not claim that he made any specific efforts to file his motion within the established limitations period, did not that he acted with the diligence required to render equitable tolling appropriate. 28 U.S.C.A. § 2255(3).

Janice Bergmann (Court-Appointed), Fed. Pub. Def., Fort Lauderdale, FL, Kathleen M. Williams (Fed. Pub. Def.), Miami, FL, for Petitioner-Appellant.

Lisette M. Reid, Anne R. Schultz, U.S. Atty., Jonathan D. Colan, Miami, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and MARCUS, Circuit Judges, and MUSGRAVE *, Judge.

* Honorable R. Kenton Musgrave, Judge, United States Court of International Trade, sitting by designation.

MARCUS, Circuit Judge:

Michael Donald Dodd, a federal prisoner, appeals the dismissal of his petition to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Dodd claims that his conviction violated both the Sixth Amendment and the Due Process Clause because the district court failed to charge the jury that in order to find him guilty of engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848, it had to find him guilty of each constituent violation by a unanimous vote. The district court dismissed Dodd's petition after adopting a Report and Recommendation from a magistrate judge which concluded that Dodd had failed to file his § 2255 application within the one-year statute of limitations applicable to such motions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2255(1)-(4). After thorough review of the record and the parties' briefs, we find no reversible error and affirm.

I.

The factual background of this case is relatively straightforward, and we offer only the following brief summary of the relevant facts and procedural history. On June 25, 1993, a grand jury sitting in the United States District Court for the Southern District of Florida charged Dodd by superseding indictment with knowingly and intentionally engaging in a CCE, in violation of 21 U.S.C. §§ 841 and 846 ("Count I"); conspiring to possess with intent to distribute marijuana (as part of Count I's CCE), in violation of 21 U.S.C. § 841(a)(1) ("Count II"); conspiring to possess with intent to distribute cocaine (as part of Count I's CCE), in violation of 21 U.S.C. § 841(a)(1) ("Count III"); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. § 1546(a) ("Counts IV-XIX"), arising out of his leadership role in the "Spangler Posse," a large Jamaican drug distribution network based in New York City, from the 1970's through at least the 1980's.

After trial by jury, Dodd was found guilty as to all counts except for Count III. The district court imposed a 360-month term of imprisonment, followed by five years of supervised release. On May 7, 1997, we affirmed his conviction on direct appeal. *See United States v. Dodd*, 111 F.3d 867 (11th Cir.1997) (per curiam). Dodd did not petition the Supreme Court for certiorari, and his conviction became final on August 6, 1997, when the time for filing a petition for certiorari expired.[1]

On April 4, 2001, more than three years later, Dodd filed this § 2255 petition, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that to find him guilty of the CCE count, it had to find him guilty of each constituent violation by a unanimous vote. Dodd based his argument on the Supreme Court's June 1, 1999, decision in *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) (holding that to find a defendant guilty on a CCE count, a jury must find the defendant guilty by a unanimous vote of each of the constituent violations of the CCE).

1. This Court has held that where a prisoner does not file a petition for certiorari, "within the meaning of § 2255 . . . the judgment becomes final on the date on which the defendant's time for filing such a petition expires." *Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir.) (internal quotation marks omitted), *cert. denied*, 537 U.S. 875, 123 S.Ct. 287, 154 L.Ed.2d 127 (2002). Similarly, the Supreme Court has indicated that convictions become final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987). The period in which a petition for certiorari must be filed ordinarily ends ninety (90) days after the entry of judgment. Sup.Ct. R. 13. In this case, Dodd did not file a petition for certiorari, and his conviction became final 91 days after this Court affirmed his conviction on May 7, 1997.

In its response to Dodd's petition, the government argued that Dodd's motion was time-barred, because it had been filed well beyond AEDPA's one-year limitations period.[2] While the government conceded that the date the statute of limitations begins to run for a *Richardson* claim is unsettled in this Circuit, it urges us to hold that AEDPA's one-year statute of limitations period began to run on June 1, 1999, the day the Supreme Court decided *Richardson*. Under these circumstances, Dodd's petition—filed almost two years later—plainly would be untimely unless the statute of limitations were somehow tolled.

Dodd responds that the one-year statute of limitations period for *Richardson* claims did not begin to run until April 19, 2002, when this Court made *Richardson* retroactively applicable to cases on collateral review in *Ross v. United States*, 289 F.3d 677 (11th Cir.2002), *cert. denied*, 537 U.S. 1113, 123 S.Ct. 944, 154 L.Ed.2d 787 (2003). If we adopt this date as the trigger for the statute of limitations, then any motion filed prior to April 19, 2003—including Dodd's—would be timely.

In the alternative, Dodd says that even if the limitations period began to run immediately after *Richardson* was decided, it should be equitably tolled from October 25, 1999, to September 11, 2000, during which time he was in custody of the U.S. Marshal, did not have access to his legal papers, and was impeded from filing his motion. On October 25, 1999, Dodd was transported from the federal correctional facility in Talladega, Alabama, where he maintained his legal papers, to the federal detention center in Miami, Florida, pursuant to a writ of habeas corpus ad testificandum issued by the United States Attorney for the Southern District of Florida. During his time in Miami, Dodd's papers remained in Talladega. He was returned to Talladega on September 11, 2000.

Dodd filed his § 2255 motion approximately seven months later, on April 4, 2001. Subsequently, on October 18, 2001, the magistrate judge issued a Report and Recommendation concluding that Dodd's motion should be dismissed because (1) the motion was filed more than one year after the Supreme Court's decision in *Richardson*, and was thus time-barred, and (2) Dodd failed to demonstrate that the circumstances surrounding his late filing were extraordinary or could not have been overcome with due diligence. The district court adopted the magistrate judge's Report and Recommendation on October 31, 2001, and dismissed Dodd's motion as time-barred.

The district court granted Dodd a Certificate of Appealability on the issue of whether the limitations period should have been equitably tolled. This Court subsequently expanded the Certificate of Appealability to include the following issue:

> [F]or purposes of a newly recognized right, pursuant to 28 U.S.C. § 2255(3), does the one-year statute of limitations begin to run on the date the Supreme Court initially recognized the right, or (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

2. AEDPA provides, at 28 U.S.C. § 2255, paragraph 6:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .

does it begin on the date a court first held that the right is recognized retroactively on collateral review?

This question—regarding the date from whence the one-year limitations period of 28 U.S.C. § 2255(3) begins to run—has generated a split among our sister Circuits. *Compare United States v. Lopez*, 248 F.3d 427, 432–33 (5th Cir.2001) (concluding that limitations period begins to run on the date Supreme Court initially recognizes new right), *Nelson v. United States*, 184 F.3d 953, 954 (8th Cir.1999) (same), *Triestman v. United States*, 124 F.3d 361, 371 n. 13 (2d Cir.1997) (stating same in *dicta*) and *Donaldson v. United States*, Nos. 01–CV–1061(NPM) & 92–CR–51–001, 2002 WL 1839213 at *4 (N.D.N.Y. Aug. 6, 2002) (following *Triestman*) *with Ashley v. United States*, 266 F.3d 671, 673–74 (7th Cir.2001) (concluding that the limitations period begins to run on the date when the new right is declared to be retroactively applicable on collateral review), *United States v. Valdez*, 195 F.3d 544, 547–48 (9th Cir.1999), *United States v. Lloyd*, 188 F.3d 184, 187–88 (3d Cir.1999) (assuming that limitations period begins to run only after either Supreme Court's own retroactivity decision or decision by Court of Appeals declaring right retroactively available on collateral review within the relevant circuit), and *Berthoff v. United States*, 140 F.Supp.2d 50, 59–60 (D.Mass. 2001) ("[T]his Court ... believes the better interpretation of section 2255(3) is that the new limitations period should run from the date on which either the Supreme Court or the controlling circuit court holds the new right to be retroactive on collateral review.").

After thoroughly reviewing the record and the briefs, as well as the conflicting case law as to when the limitations period in § 2255(3) begins running, we affirm the dismissal of Dodd's § 2255 motion. In doing so, we jo... those circuits which have concluded that the limitations period in § 2255(3) is triggered on the date the Supreme Court initially recognizes a new right. We further hold that Dodd has failed to present sufficient evidence to support the application of the doctrine of equitable tolling, an "extraordinary remedy" which we apply only "sparingly." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000)

II.

[1] This Court reviews *de novo* a district court's determination "that a petition for federal habeas corpus relief was time-barred," *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir.2002), as we review all issues concerning statutory interpretation. *Kaufmann*, 282 F.3d at 1337; *see also United States v. Hooshmand*, 931 F.2d 725, 737 (11th Cir.1991). Likewise, we review *de novo* a "district court's determination that equitable tolling is inapplicable...." *Steed*, 219 F.3d at 1300. However, a district court's determinations of the facts relevant to a petitioner's equitable tolling claim "will be reversed only if clearly erroneous.... This standard requires us to affirm a district court's findings of fact unless 'the record lacks substantial evidence' to support that determination." *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002) (citing *Dorsey v. Chapman*, 262 F.3d 1181, 1185 (11th Cir.2001) and quoting *Lightning v. Roadway Express, Inc.*, 60 F.3d 1551, 1558 (11th Cir.1995)), *cert. denied*, 537 U.S. 1237, 123 S.Ct. 1364, 155 L.Ed.2d 205 (2003). "We have squarely held that a determination regarding a party's diligence is a finding of fact that 'will not be disturbed unless clearly erroneous.'" *Id.* (quoting *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir.1986)).

III.

We address, first, whether the district court erred in determining that, for the purposes of a newly recognized right pursuant to 28 U.S.C. § 2255(3), AEDPA's one-year statute of limitations begins to run on the date when the Supreme Court initially recognizes the right.

Subsection (3) of § 2255 provides that the statute's one-year period of limitation shall run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" 28 U.S.C. § 2255(3).

[2] We have recognized, as have the other circuits, that *Richardson* established a newly created right within the meaning of § 2255(3). *See Ross*, 289 F.3d at 681; *see also Santana-Madera v. United States*, 260 F.3d 133, 139 (2d Cir.2001); *Lopez*, 248 F.3d at 432; *Murr v. United States*, 200 F.3d 895, 906 (6th Cir.2000). Indeed, the government has expressly conceded this point. Appellees' Brief at 6 ("Dodd is correct in his assertion that the Supreme Court recognized a new right in *Richardson*.").

[3] There is likewise no doubt that the new right announced in *Richardson* is retroactively available on collateral review. *See Ross*, 289 F.3d at 681 (11th Cir.2002). Neither party contends that § 2255(3) requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so. As a panel of this Court noted, every circuit to consider this issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255(3). *Garcia v. United States*, 278 F.3d 1210, 1213 n. 4 (11th Cir.) (citing *Lopez*, 248 F.3d at 431; *Ashley*, 266 F.3d at 673–74), *cert. denied*, 537 U.S. 895, 123 S.Ct. 180, 154 L.Ed.2d 163 (2002);[3] *see also United States v. Swinton*, 333 F.3d 481, 487 (3d Cir.) ("We conclude—and the parties agree—that the statute of limitations provision of § 2255 allows district courts and courts of appeals to make retroactivity decisions."), *cert. denied*, — U.S. —, 124 S.Ct. 458, 157 L.Ed.2d 330 (2003).[4]

3. In *Garcia*, a panel of this Court recognized but did not decide the issue of when the § 2255(3) limitations period begins to run. *See* 278 F.3d at 1213 n. 5. In that case, we identified the question as "whether the one-year limitation period begins to run on the date on which the right is initially recognized by the Supreme Court, or the date on which it is held retroactively applicable by the court of appeals or the Supreme Court[,]" and observed that:

> [t]here is a split among the circuits on how these questions should be answered.... It might present a problem to conclude *both* that the limitation begins to run when the Supreme Court initially recognizes the right *and* that a petitioner may not rely on that right until there is controlling circuit authority holding the right retroactively applicable to cases on collateral review, because in that case the opportunity for review offered by § 2255(3) would largely evaporate: as previously noted, it often happens that more than a year elapses before a right newly recognized by the Supreme Court is held to be retroactively applicable by an appellate court. In light of the circuit split and the absence of controlling authority in this Circuit, prudent petitioners will treat the earlier date—the date on which the right is newly recognized by the Supreme Court—as the date on which the one-year limitation period begins to run.

278 F.3d at 1213 n. 5.

4. The Fourth Circuit interpreted § 2255 in a case involving a second or successive habeas petition, noting in a footnote that "since the Supreme Court has not yet ruled on the collateral availability of the rule ... the limitations period has not yet begun to run." *In re Vial*, 115 F.3d 1192, 1197 n. 9 (4th Cir.1997) (*en banc*). As we noted in *Garcia*, however, that case involved a second or successive petition, rather than an initial petition, as in the instant case. *See Garcia*, 278 F.3d 1210, 1213 n. 4. The section of law pertinent to second or successive petitions explicitly requires the retroactivity determination to be made by the Supreme Court, stating that a court of appeals may authorize a second or successive application if it would rest on "a

[4] While Dodd's motion meets the substantive requirements of § 2255(3)—it is based on a new right identified by the Supreme Court in *Richardson* made retroactively applicable to cases on collateral review—the critical question remains whether his motion is timely. To state the issue in more specific terms, since Dodd filed his motion on April 4, 2001, it would not be timely if the one-year limitations period in § 2255(3) began to run on June 1, 1999, when the Supreme Court first recognized the new right by deciding *Richardson*. If, however, the statute of limitations did not begin to run until April 19, 2002, when this Court held in *Ross* that the newly created *Richardson* right was retroactively available on collateral review, then Dodd's motion was timely filed well before the limitations period ended on April 19, 2003.

We begin with the plain language of the statute in question. *See Harris v. Garner*, 216 F.3d 970, 972 (11th Cir.2000) (*en banc*) (noting that "courts should always begin the process of legislative interpretation, and ... often should end it as well, ... with the words of the statutory provision."). Here, as the Second Circuit noted, "the statute provides that the limitations period begins to run on 'the date on which the right asserted was *initially* recognized by the Supreme Court,' 28 U.S.C. § 2255 (emphasis added), which may be different from the date on which the right is later made retroactively available to cases on collateral review." *Triestman*, 124 F.3d at 371 n. 13. There is no reason to read the unambiguous term "initially" as signifying anything other than its common-sense and ordinary meaning of "from the beginning." *See Webster's Third New International Dictionary* 1164 (1961) (defining "initially" to mean "in the first place" and "at the beginning"). *See also In re Griffith*, 206 F.3d 1389, 1393 (11th Cir.2000) (*en banc*) ("In interpreting the language of a statute, we generally give the words used their ordinary meaning." (internal quotation marks and citations omitted)).

If the one-year limitation period runs *only* from the date on which the Supreme Court *initially* recognized the new right, we must determine the purpose of the qualifying clause that follows: "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(3). It would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to ambiguous events. Rather, we believe Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review. Thus, the second clause in § 2255(3) qualifies the right asserted—not the time limit.[5]

Put simply, if Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from ... the date on which the right asserted was *initially* recognized by the Supreme Court...." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("[W]e must presume that Congress said what it meant and meant what it said." (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992))).

We turn then to the problem that a panel of this Court recognized in *Garcia*: that the opportunity for review presented by § 2255(3) would disappear if, at the same time we concluded that the limitation period begins to run when the Supreme Court initially recognizes the right, we also determined that a petitioner could not rely on that right until there is controlling circuit authority holding the right retroactively available. *Garcia*, 278 F.3d at 1213 n. 5; *see also Ashley*, 266 F.3d at 673–74 (under such an interpretation, § 2255(3) would be a "mirage," given that more than a year can elapse between Supreme Court decision and retroactivity ruling). While our holding today embraces the former proposition, we explicitly reject the latter.

Implicit in the conclusion that *any* court may make the retroactivity decision is the necessary inference that a petitioner *need not* wait for a controlling decision before filing his petition. Because a petitioner need not wait for the Supreme Court to address the issue of retroactivity, he may assert a claim in a district court as soon as a new right is recognized by the Supreme Court—in the hope, of course, that the district court will find the new right retroactively available on collateral review. *See Swinton*, 333 F.3d at 487 ("the statute of limitations provision of § 2255 allows district courts and courts of appeals to make retroactivity decisions."). Under this interpretation, therefore, a petitioner may file a § 2255(3) motion *immediately* after the Supreme Court decision announcing the right upon which the motion is based.

As a result, our analysis favors petitioners hoping to benefit from new rules announced by the Supreme Court. In cases based on *Richardson* rights, under our analysis, a petitioner could have filed a § 2255(3) motion immediately after the decision, or as early as June 2, 1999. Under the interpretation urged by Dodd, however, where the limitations period is not triggered until the right is made retroactively applicable, petitioners in this Circuit would have had to wait to file until this Court decided *Ross* in April 2002, meaning that prisoners would have to sit on their rights for almost three years. And in other circuits, where even more time elapsed before a decision on retroactivity was made, the wait could be even longer. Finally, if all petitioners faithfully awaited a retroactivity decision before asserting their rights—a situation theoretically possible if not practically imaginable—the Supreme Court and the circuits might never have occasion to make a retroactivity decision and the one-year window for filing a § 2255(3) motion might *never* open.

Moreover, Dodd's argument loses much of its force when we observe that in his own case he did not stand idly by for the three years before *Ross* was decided: indeed, Dodd filed his motion more than a year before that decision. Here, Dodd's actions speak louder than his words, and suggest that, at bottom, his argument really is that a petitioner may file a § 2255(3) motion beginning immediately after the Supreme Court announces a new right, *and* at any time up until one year after the first retroactivity decision is handed down. For motions relying on *Richardson* in this Circuit, then, Dodd effectively urges a limitations period of nearly four years, from

new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable." 28 U.S.C. § 2255 ¶ 8(2) (emphasis added).

5. As the Fifth Circuit noted, "[t]he portion of § 2255(3) that triggers [the] limitations period contains the phrase 'right asserted.' Subsequently, 'that right' is limited by the retroactivity requirement. Therefore the retroactivity on collateral review aspect is not *contained within* the term 'right[,]' " *Lopez*, 248 F.3d at 433 (emphasis added), but rather qualifies and limits it.

June 1, 1999, when *Richardson* was decided, until April 19, 2003, a year after the *Ross* decision. This putative four-year period of limitations—a period which could be significantly longer in many circumstances—cannot be squared with AEDPA's unambiguous intention to bring certainty to this area of the law, and to give petitioners but a single year in which to file their claims.

Moreover, if we adopted Dodd's analysis and concluded that the limitations period in § 2255(3) did not begin to run until controlling circuit authority held a right retroactively applicable to cases on collateral review, this would yield not only different start dates in different jurisdictions, but also would result in uncertain limitations periods throughout the nation. The limitations period in each federal circuit could have a different start date, depending on when the retroactivity issue was decided there. In different circuits, petitioners would have to sit on their hands for different lengths of time, unable to assert their claims until after a retroactivity decision was made for the one-year window of opportunity to open.[6]

Alternatively, if the period began immediately after the Supreme Court decision and lasted until a year from the first retroactivity decision, each circuit would effectively have a different statute of limitations, many of which could stretch on for years. *See Lopez*, 248 F.3d at 433 (noting that if the limitations period only begins with the retroactivity decision, multiple situations could arise in which "the limitations period would never be triggered, and any petitioner's out-of-time motion would be timely, a likely unintended consequence by Congress."). So unpredictable and inconsistent a result would neither further the interest of judicial efficiency nor be consonant with the intent of a statute which, on its face, plainly aims to establish a single, uniform statute of limitations.

Because we interpret the limitations period according to its plain language, and consistently with the policy choices underlying AEDPA, we conclude that the one-year window of opportunity in which Dodd could have timely filed a habeas petition asserting the right recognized in *Richardson* opened on June 1, 1999, when that case was decided, and closed one year later. Since Dodd did not file his § 2255 motion until April 4, 2001 (almost three years later), the district court properly determined that it was time-barred, unless the statute of limitations was equitably tolled.

IV.

We are unpersuaded by Dodd's alternative argument that the district court erred in concluding that he was not entitled to "equitable tolling."[7]

6. We note further that, even within a single circuit, retroactivity decisions by different district courts would arguably trigger the limitations period at different times, injecting still further uncertainty into the determination of the appropriate limitations period. Moreover, more than a year might often elapse between the time a district court initially found a new right retroactively available on collateral review and the time the circuit court reviewed that decision.

7. In addition to arguing for equitable tolling, Dodd also suggested in the district court that his motion was timely based on 28 U.S.C. § 2255(2), which provides that the one-year statute of limitations begins after "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed." This issue is beyond the scope of Dodd's Certificate of Appealability ("COA"), and therefore not properly reviewed by this Court. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir.1998) ("[W]e hold that in an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA."). Moreover, even if the issue were properly before us, Dodd's contentions would still fail.

Dodd says that even if we hold that the limitations period embodied in § 2255(3) began to run immediately after the *Richardson* decision, his motion is still timely because of equitable tolling from October 25, 1999 to September 11, 2000. Dodd explains that 146 days elapsed between the *Richardson* decision on June 1, 1999, and his transfer from Talladega on October 25, 1999, and that 205 days elapsed between his return to Talladega on September 11, 2000, and the time he filed his motion on April 4, 2001. Thus, Dodd argues, if the statute of limitations were tolled during the time Dodd was away from Talladega, only 351 days (146 + 205 days) would have elapsed from the date of the *Richardson* decision to Dodd's filing, bringing his motion within the one-year limitations period. See *Knight v. Schofield*, 292 F.3d 709, 712 (11th Cir.2002) (explaining that "the clock is stopped while tolling is in effect").

Dodd also says that during the period after his return to Talladega, he spent considerable time trying to obtain documentation, and that the government would not provide him with the necessary material until he filed suit under the Freedom of Information Act, 5 U.S.C. § 552. Dodd seems to suggest, therefore, that his motion was filed as swiftly as was possible under the circumstances. He does not contend, however, that he made any attempt to have his legal papers forwarded to him while he was in Miami.

The government responds that equitable tolling is not applicable here, given the nearly five months Dodd had to file a motion based on *Richardson* before his transfer to Miami *and* the seven additional months he spent after his return to Talladega before filing his motion. Thus, the government urges, Dodd has not shown that his untimely filing was due to extraordinary circumstances beyond his control and otherwise unavoidable even with due diligence.

[5] While equitable tolling is an "extraordinary remedy which is typically applied sparingly," *Steed*, 219 F.3d at 1300, it "can be applied to prevent the application of AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir.2001); *see also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999) (holding that the limitations period may be equitably tolled where "a movant untimely files because of *extraordinary circumstances* that are both beyond his control and *unavoidable even with diligence*" (emphasis added)). "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." *Drew*, 297 F.3d at 1286. To establish diligence, then, the petitioner must present evidence showing reasonable efforts to timely file his action. *Id.* at 1287–89.

In *Akins*, a panel of this Court held that equitable tolling was inapplicable for periods of various lockdowns or during a period in which the movant's legal papers were misplaced by the prison. 204 F.3d at 1089–90. It is true that the facts of *Akins* are distinguishable from the case at hand, as the § 2255 movant there had failed to act for four years prior to the enactment of AEDPA, at least seven months after he

As a panel of this Court held in *Akins v. United States*, in order to prevail under § 2255(2), an alleged governmental impediment must be unconstitutional, one that is "not 'reasonably related to legitimate penological interests.'" 204 F.3d 1086, 1090 (11th Cir.2000) (citation omitted). Dodd does not argue that his time spent in the custody of the U.S. Marshal in Miami was unconstitutional, and thus, this detention cannot support a claim under § 2255(2).

obtained a transcript which he deemed necessary to his case, and at least six months after the enactment of AEDPA. Nonetheless, *Akins* suggests that lockdowns and periods in which a prisoner is separated from his legal papers are not "extraordinary circumstances" in which equitable tolling is appropriate.

[6] While Dodd contends that the limitations period in § 2255(3) should have been tolled during the period he was detained in Miami and did not have access to his papers, we cannot discern sufficient evidence in this record to establish that the circumstances were truly extraordinary. Dodd does not suggest, let alone argue that his detention was unconstitutional or somehow inappropriate, or that the transfer of a prisoner from one facility to another is anything but a routine practice.

Nor has Dodd shown that he acted with the diligence required to render equitable tolling appropriate to this case. Following the *Richardson* decision, Dodd had nearly *five* additional months with no impediments to stop him from preparing or filing a § 2255 motion. Moreover, Dodd has presented no evidence to show that, while he was in custody in Miami, he made any request to have his papers delivered to him,[5] attempted to contact counsel to assist him with timely filing his motion, or otherwise undertook any action that would suggest reasonable diligence under the circumstances. Indeed, Dodd has not claimed that he made any specific efforts to file his motion within the established limitations period, either in the five months before he was transferred to Miami or in the *seven* months after his return to Talladega.

Simply put, Dodd has not shown with any degree of particularity what efforts he made that would even arguably constitute an appropriate degree of diligence for someone in his situation. Nor, finally, has he demonstrated why, if he had acted with the diligence plainly required to trigger the doctrine of equitable tolling, he could not have filed within the one-year period. Quite simply, we cannot conclude that the district court's finding that Dodd failed to demonstrate due diligence was clearly erroneous, and, as a result, Dodd's "lack of diligence bars us from reaching out and granting the rare and extraordinary remedy of equitable tolling." *Drew*, 297 F.3d at 1290 n. 5.

V.

Accordingly, we hold today that, for the purposes of a newly recognized right under 28 U.S.C. § 2255(3), the one-year statute of limitations begins to run on the date the Supreme Court *initially* recognizes the right. As a result, Dodd's § 2255 motion, filed nearly two years after the Supreme Court initially recognized the new right in *Richardson*, is barred by the applicable one-year limitations period. Moreover, Dodd is not entitled to equitable tolling of the limitations period because he has shown neither extraordinary circumstances nor the diligence necessary to toll the statute. It follows that the district court did not err in dismissing Dodd's § 2255 motion as untimely.

AFFIRMED.

5. On appeal, Dodd's counsel asserts that Dodd was prevented from taking his legal materials with him to Miami "[p]ursuant to a policy of the Federal Bureau of Prisons," thus apparently implying that his failure to exercise diligence in requesting his legal papers should be excused for futility. Appellant's Brief at 24. However, Dodd's counsel does not direct our attention to such a policy, citing only an Inmate Personal Property Record—an inventory of his property stored at Talladega—appended as an exhibit to Dodd's Reply to the Government's Response to his § 2255 Motion. Notably, in his Reply, Dodd cites this exhibit only to prove that his files remained in Talladega, not that they were maintained there, against his wishes, pursuant to a particular policy. The unsupported suggestion of futility, without more, is insufficient to defeat the diligence required in this context. Nor would this period excuse the failure to act for the seven months *after* he was returned to Talladega.

APPENDIX A-2

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1347-CIV-MORENO
(93-304-CR-MORENO)
MAGISTRATE JUDGE SORRENTINO

MICHAEL DONALD DODD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.,

ORDER OF DISMISSAL
MOTION TO VACATE

FILED by D.C.
OCT 31 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA.

For the reasons stated in the Report of the Magistrate Judge and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This motion to vacate pursuant to 28 U.S.C. §2255 is dismissed, as time barred.

2. All motions related to the civil case not otherwise ruled upon are dismissed, as moot.

3. The case is closed.

DONE AND ORDERED at Miami, Florida, this 31st day of October, 2001.

UNITED STATES DISTRICT JUDGE

cc: Michael Donald Dodd, Pro Se
Jacqueline Becerra, AUSA

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APPENDIX A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1347-CIV-MORENO
(93-304-CR-MORENO)
MAGISTRATE JUDGE SORRENTINO

MICHAEL DONALD DODD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT RE DISMISSAL OF §2255 MOTION AS TIME-BARRED

FILED by MAG. SEC D.C.
OCT 18 2001
CLARENCE MADDOX CLERK U.S. DIST. CT. S.D. OF FLA - MIAMI

This motion to vacate pursuant to 28 U.S.C. §2255 was filed by the clerk on April 4, 2001. The judgment of conviction in the underlying criminal case, No. 93-304-Cr-Moreno, became final on or about August 7, 1997, when time expired for filing a petition for writ of certiorari.[1]

The government has invoked the statute of limitations. Pursuant to 28 U.S.C. §2255, as amended April 24, 1996, a one year period of limitations applies to a motion under the section. The one year period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the

[1]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for writ of certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986). Ordinarily, a petition for writ of certiorari must be filed within 90 days of the date of the entry of judgment rather than the issuance of a mandate. Sup.Ct.R. 13.

Constitution or laws of the United States is removed, if the movant is prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

A jury convicted Dodd of engaging in a criminal enterprise, conspiring to possess with intent to distribute cocaine and marijuana, and using a fraudulent document to gain entry into the United States. The Court sentenced him to 360 months imprisonment. Dodd's convictions and sentences were affirmed in an opinion entered on May 7, 1997. (DE# 144). He did not petition the Supreme Court for writ of certiorari, and his convictions became final on or about August 7, 1997, when time expired for doing so. He filed this motion to vacate well over one year later on April 4, 2001.

Dodd replied to the government's response, and argued that the motion is timely because it was filed within one year of the date that the Supreme Court issued Apprendi v. New Jersey, 530 U.S. 466 (2000) on June 26, 2000 and that the motion is based in part upon Richardson v. United States, 526 U.S. 813 (1999). He argues that both cases apply retroactively to cases on collateral review, and therefore defeat the statute of limitations. Dodd also argues that the limitations period should be equitably tolled and the motion

deemed to be timely filed, based upon the fact that he was transferred from the Institution where he is usually housed and where his papers were located.

It is initially noted that the Supreme Court did not newly recognize a right which is retroactively applicable to cases on collateral review in Apprendi, supra, and that the Eleventh Circuit has recently held that Apprendi does not apply retroactively to cases on collateral review. See McCoy v. United States, ___ F.3d ___, 2001 WL 1131653 (11 Cir. 2001).

Richardson, supra was decided in 1999, more than one year before this motion to vacate was filed. Thus Dodd's reliance upon Richardson does not overcome the statute of limitations.

The Eleventh Circuit has held that the limitations period may be equitably tolled when a movant's timely filing of a motion to vacate is impeded by extraordinary circumstances beyond his control and unavoidable even with due diligence. Sandvik v. U.S., 177 F.3d 1269 (11 Cir. 1999).

Dodd has not demonstrated that the circumstances underlying the untimely filing of the motion to vacate are extraordinary or that the delay was unavoidable even with due diligence. His claims

are based upon Richardson, supra, which was decided on June 1, 1999, four months before he was transferred from the correctional facility. After he was returned to the facility, he waited seven additional months before filing this motion to vacate. He has failed to demonstrate either that the state created an impediment which prevented his timely filing, or that extraordinary circumstances existed which entitle him to equitable tolling.

It is therefore recommended that this motion to vacate be dismissed as time-barred.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: October 18, 2001

Charlene H. Sorrentino
UNITED STATES MAGISTRATE JUDGE

cc: Michael Donald Dodd, Pro Se
Reg. No. 09925-424
FCI - Talladega
565 East Renfroe Road
Talladega, AL 35160

Jacqueline Becerra
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99 N.E. 4th Street
Miami, FL 33132-2111

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 14th day of July, 2004, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

KATHLEEN M. WILLIAMS
Federal Public Defender

Fort Lauderdale, Florida
July 14, 2004

By: Janice L. Bergmann
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No:

IN THE
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OCTOBER TERM, 2003

MICHAEL DONALD DODD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

DECLARATION VERIFYING TIMELY FILING

Petitioner, Michael Donald Dodd, through undersigned counsel and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was placed in the U.S. mail in a prepaid first class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 14th day of July, 2004, which is prior to the time the petition for writ of certiorari is due on July 15, 2004.

KATHLEEN M. WILLIAMS
Federal Public Defender

Fort Lauderdale, Florida
July 14, 2004

By: _____

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